power to the widow; *Henderson* v. *Blackburn* (1882), 104 Ill. 227, 44 Am. Rep. 780, holding "to have and to hold or to dispose of so much of the same as she may need or wish to use during her life time" and "after her death if there is anything left" gave her no power beyond her express life estate; *Patty* v. *Goolsby* (1888), 51 Ark. 61, 9 S. W. 846, holding the power extended only to the personal property, under the gift of "all my negroes, lands, stock" (&c.) "to have and to hold during her natural life, or until she may think proper to marry, with full power to sell and dispose of such property as she may think proper"; *Miller* v. *Porterfield* (1890), 86 Va. 876, 11 S. E. 486, 19 Am. St. 919, holding that no power was given by the words "to have and to hold the same for her own use and benefit, and also to make such disposition of the same that she in her judgment may deem best, should it become necessary that a part or all should become necessary for the support of herself," and "After the death of the said Elizabeth, I will and devise that any and all property remaining unused shall be given" &c.; and now comes the Supreme Court of South Carolina to add to the list of fatalities created by this dictum by deciding, after quoting it as above, and without even mentioning numerous prior decisions of the South Carolina court, including *Fronty* v. *Fronty* (1833), 1 Bailey Eq. 517, to the contrary on like facts, that no power is given by the words: "My wife, Jane, to have the right to dispose of any property as she may think best for the purpose of paying all just debts and supporting herself and children while she remains my widow"; and this merely because a previous clause of the will gave her a life estate in all his property. *Sheffield* v. *Graig* (1916), — S. C. —, 89 S. E. 664.

J. R. R.

WHAT OBLIGATIONS ARE INCLUDED IN THE DESCRIPTION OF "IMPLIED CONTRACTS?"—This question arose in the case of *People* v. *Dummer*, 113 N. W. 934, recently decided by the Supreme Court of Illinois. The state had brought suit in debt in the Municipal Court of Chicago against the defendant for taxes alleged to be due from him. By statute the municipal court was given jurisdiction over all actions on contracts, express or im-

---

it (payment of debts or the like), but the court does cite the case of Brant v. Virginia Coal Co. with apparent approval.

Whittemore v. Russell (1888), 80 Me. 297, 14 Atl. 197, holds that a power is not given anyone by the following words because it is not said who shall sell: "I give to my wife the use of the remainder * * * during her natural lifetime, and after her decease it is to be equally divided between my children; the real estate may be sold if thought advisable."

Russell v. Werntz (1898), 88 Md. 210, 44 Atl. 219, sheds no light on the present discussion because the court and counsel discussed only the question as to whether the devisee took an estate in fee by a devise to her "to hold and dispose of as he may see fit while she remains single." But very strict interpretation of language giving powers in this state is indicated in the later case of Bauernschmidt's Est. (1903), 97 Md. 35, 54 Atl. 637, and Meister v. Meister (1913), 121 Md. 440, 88 Atl. 225.

Winchester v. Hoover (1902), 42 Ore. 313, 70 Pac. 1036, contains no power to the life tenant; it is "to have and to hold during her life, or while she shall remain unmarried, to pay my debts, to support herself, and to maintain and educate minor children"; but the court does quote and approve the dictum of Mr. Justice Field above quoted.

plied, when the amount claimed by the plaintiff, exclusive of costs, exceeded $1,000.00. Judgment for the plaintiff was reversed on the ground that the court had no jurisdiction, inasmuch as the cause of action was deemed not to be based on a contract express or implied.

It is plain that if the court was entitled to jurisdiction over the case, it was for the reason that the cause of action was based on implied contract, for it could hardly be said that the obligation to pay a tax arises out of an express contract. It is also clear that the contract, if implied at all, must have been implied in law and not in fact, for there were no acts or words of the taxpayer from which an actual intention to pay could have been presumed. The intention of the legislature must govern in determining what is included in the term "implied contract." That intention can be gathered by considering what is generally meant by the term as used by writers and courts. Does it mean a contract in fact, that is, one based on consent implied from words or acts, or does it include, in addition to the above, all non-contractual obligations which are treated for the purpose of affording a remedy as if they were contracts? Or does the term include, besides contracts in fact, only that group of non-contractual obligations founded on "unjust enrichment," technically called quasi-contracts?

On the precise point involved in the suit for taxes in the principal case, there seems to have been little, if any, adjudication. However, some light may be thrown on the problem by considering the same question as it has arisen in connection with the jurisdiction of the United States Court of Claims. By the Act of Congress of February, 1855, that court was given jurisdiction over "* * * all claims founded * * * upon any contract, express or implied, with the government of the United States * * * " It has been held quite precisely that the "implied contract" of the statute includes only those in fact, that is, those implied from the acts or words of the parties, the mutual consent being presumed from conduct rather than expressed. *Schillinger's Case,* 24 C. C. Rep. 278; *Russell* v. *United States,* 35 C. C. Rep. 154; *Harley* v. *United States,* 39 C. C. Rep. 105; *Knapp* v. *United States,* 46 C. C. Rep. 601. These decisions hold conclusively that "implied contract" does not include contracts implied in law, that is, neither quasi-contracts nor any other obligations which are contractual only from the viewpoint of the remedy available for their enforcement.

The preceding discussion would seem to support absolutely the ruling in the principal case but for one consideration. The Illinois court in interpreting the statute, stated that the term in question had been extended to include "a class of obligations which are created by law without regard to the assent of the party upon whom the obligation is imposed, on the ground that they are dictated by reason and justice." Yet the court refused to extend it to the case of an obligation to pay a tax. The term as defined so as to include quasi-contracts in the narrow sense, that is, "unjust enrichment" cases, is supported by authorities. *Chudnovski* v. *Eckels,* 232 Ill. 312; *Harty Bros.* v. *Polakow,* 237 Ill. 559; *Pache* v. *Oppenheim,* 87 N. Y. Supp. 704; *Devery* v. *Winton Motor Carriage Co.,* 97 N. Y. Supp. 392. Two things are of interest in connection with the Illinois cases, cited *supra,* allowing this

form of jurisdiction over quasi-contracts. In *Chudnovski* v. *Eckels,* the court quotes BLACKSTONE, 3 COMM. 158, to show that the term "implied contract" includes what is called a contract implied in law. However, the court seems to have overlooked the fact that the learned writer in that very portion of his work included a tax in the same category, as is evidenced by the fact that he used a statutory obligation as one example of implied contract. In the case of *Harty Bros.* v. *Polakow,* the action was based on a statutory lien, a mere duty or obligation, as it were, and jurisdiction was taken with implied contract as the basis. Several well considered cases outside of Illinois have held that a tax is an obligation based on an implied contract. *State of Nevada* v. *Y. J. M. Co.,* 14 Nev. 220; *City of Dubuque* v. *Ill. Cent. R. R. Co.,* 39 Iowa 56.

It is evident, then, that the Illinois court defines "implied contract" as more extensive than contract implied in fact, but not so extensive as to include all non-contractual obligations termed contract for the sake of the remedy only. Why should there be a middle course? "The term 'quasi-contracts' may with propriety be applied to all non-contractual obligations which are treated for the purpose of affording a remedy as if they were contracts. So interpreted, the subject includes: (1) judgments and other so-called contracts of record; (2) a number of official and statutory obligations * * * ; (3) obligations arising from 'unjust enrichment,'—that is, the receipt by one person from another of a benefit the retention of which is unjust. But in view of the fact that nearly all of the obligations included in the first two classes are commonly known and treated under more specific designations, or as parts of other clearly defined topics, while those of the third class have no other distinctive name whatever, it is believed that the term 'quasi-contracts,' for the sake of convenience, should ordinarily be applied to obligations of the third class only." WOODWARD, LAW OF QUASI-CONTRACTS, 1. There is a great deal to be said in making the criterion of jurisdiction one of remedy or form rather than one of substance, for then a court can determine whether it has jurisdiction by merely examining the most general pleadings. And this in spite of the position taken by the United States Court of Claims. However, there can be little justification for taking jurisdiction over one obligation which is contractual only for remedy's sake, and refusing to take jurisdiction over another similar non-contractual obligation which can be enforced by a contractual remedy. The Illinois court, in order to be thoroughly consistent with its rulings in previous cases, which carried jurisdiction over contracts into the realm of quasi-contractual obligations, should have held that the Chicago Municipal Court had jurisdiction of the cause of action in the principal case. H. G. G.

CONSTITUTIONAL AMENDMENTS, SELF-EXECUTING AND OTHERWISE, PROVIDING FOR THE INITIATIVE AND REFERENDUM.—The question of whether or not a provision of a state constitution, which provided that amendments thereto might be made by initiative petition, was self-executing, was presented to the Supreme Court of North Dakota in the recent case of *State*